

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONALD VANCE and NATHAN ERTEL,)	No. 6 C 6964
)	
Plaintiffs,)	Chicago, Illinois
)	June 3, 2010
)	9:00 o'clock a.m.
-vs-)	
)	
DONALD RUMSFELD, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE WAYNE R. ANDERSEN

APPEARANCES:

For the Plaintiff:	LOEVY & LOEVY 312 North May Street Suite 100 Chicago, Illinois 60607 BY: MS. GAYLE M. HORN
For the Defendant:	U.S. DEPARTMENT OF JUSTICE 1425 New York Avenue Washington, D.C. 20005 BY: MR. JAMES R. WHITMAN

Court Reporter:	ROSEMARY SCARPELLI 219 South Dearborn Street Room 1412 Chicago, Illinois 60604 (312) 435-5815
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1 THE CLERK: 6 C 6964, Vance versus Rumsfeld.

2 MR. WHITMAN: Good morning, your Honor, James
3 Whitman on behalf of the United States.

4 THE COURT: Hi.

5 MR. WHITMAN: Hello.

6 THE COURT: How are you?

7 MR. WHITMAN: I am good. How are you?

8 THE COURT: I have a great life.

9 THE CLERK: We are getting Gayle -- her name is
10 Gayle Horn on the phone.

11 THE COURT: What is her name?

12 THE CLERK: Gayle Horn.

13 Gayle?

14 MS. HORN: Yes.

15 THE COURT: Hi. It is Judge Andersen. We are here
16 in court. And if opposing counsel could state his name too
17 so you know who is here, that would be helpful.

18 MR. WHITMAN: James Whitman for the United States.

19 THE COURT: Hi. Where do we -- where do we -- I
20 have issued a variety of exciting rulings.

21 MR. WHITMAN: You have, your Honor, but a couple
22 of -- well, we originally set this status conference at the
23 urging of Magistrate Judge Keys. He -- we had -- well, we
24 were before him a couple weeks ago. He thought it would be a
25 good idea if we got a status conference in front of you

1 because there were some discovery-related matters that he is
2 working on. And at the time you had not yet ruled on our
3 motion for certification or the motion to stay, so he thought
4 it would be a good idea --

5 THE COURT: Right.

6 MR. WHITMAN: -- to bring everybody up to speed on
7 what is going on.

8 But now that you have granted the United States'
9 motion for certification but denied the motion for stay, I
10 think we might have some different issues that we might want
11 to talk about.

12 THE COURT: Well, he and I had a conversation, you
13 know, when I did that because I wanted to explain to him that
14 I felt that even though the 7th Circuit is normally not
15 warmly welcoming certifications that are somewhat
16 discretionary, since this case was going to be up there
17 anyhow and since I think there was a -- there really is a
18 legitimately and interesting legal issue as to how you define
19 a war zone for purposes of the Act, that it was worthwhile
20 getting their statement on that so that we know what
21 discovery might be appropriate.

22 But I also felt other discovery might well be
23 appropriate. And, as you know, I -- as a citizen I feel a
24 sense of frustration about not having any information other
25 than the plaintiffs' assertion as to what really happened to

1 the plaintiffs and why. And I feel Judge Keys knows this
2 case extremely well. He has followed all the rulings. So my
3 view is that he knows what is up on appeal.

4 I assume -- we will see if the 7th Circuit accepts
5 the certification. I -- do you want to -- should we -- we
6 could even have a bet on it. It is such a close call. I --
7 I think -- I would say probably they will because it is such
8 an interesting question. But anyhow. But I think discovery
9 should go forward and that Judge Keys is in a great position
10 to decide what things should be discoverable and what
11 shouldn't. And if you disagree with an order of his or there
12 is some particular sticking point, I told him you could
13 appeal. Or if you are before him and you are disagreeing
14 about a particular item and you don't want to go through the
15 trouble of filing a formal appeal, you can call me -- I mean
16 he can call me and we can talk about it.

17 MR. WHITMAN: I guess the --

18 MS. HORN: That sounds -- that sounds fine, your
19 Honor. And, you know, the discovery that was pending in
20 front of Judge Keys relate to the identity of the unknown
21 defendants which plaintiffs believe will be -- will not
22 impact nor be impacted by the United States' 1292(b)
23 position.

24 MR. WHITMAN: The problem with that we have, your
25 Honor, is that if the United -- if the 7th Circuit accepts

1 the certification petition, then all the main defendants in
2 this case are going to be up on appeal and the District Court
3 won't have any jurisdiction over the United States and it
4 certainly wouldn't have jurisdiction to order discovery
5 against the United States and specifically with respect to
6 discovery on claims that are going to be directly affected by
7 defendant Rumsfeld's appeal which is currently up before the
8 7th Circuit.

9 So what I would like to pro -- what I would propose
10 is maybe a compromise, which is a stay of the proceedings,
11 including discovery, until the 7th Circuit rules on the
12 certification petition. And just so your Honor is aware,
13 really the -- the compromise that this is, our certification
14 petition is due on Monday of next week. Under the Federal
15 Rules of Appellate Procedure the plaintiffs have ten days to
16 respond to that and then that is it. There is no reply as
17 far as I know. I don't know how long the 7th Circuit will
18 take to rule on the certification petition, but it doesn't
19 seem like it is that long of a period of time.

20 THE COURT: They -- my experience has been that
21 they are pretty -- they pretty expeditiously deal with those
22 things. So --

23 MS. HORN: Your Honor -- your Honor, could I just
24 comment on --

25 THE COURT: Sure.

1 MS. HORN: -- what the United States has said, and
2 only because I think it is a misrepresentation of the issue,
3 which is that a 1292(b) petition does not divest this Court
4 of all jurisdiction over the issues. And I think in our
5 response to the defendant's motion to stay we cited a number
6 of cases that said where there are discovery issues that are
7 ancillary to the issue on appeal, even if the 7th Circuit
8 decides to take the interlocutory appeal, those discovery
9 issues can proceed while the appeal is pending.

10 And, you know, all we are trying to do and all we
11 have been trying to do for the past four years is identify
12 the unknown defendant. And we have faced obstacle after
13 obstacle from the United States in doing that. And I think
14 the problem with their compromise is that basically it is
15 just another delay tactic. And what is going to end up
16 happening is the plaintiffs are going to run out of time in
17 their ability to identify these unknown defendants.

18 So I would just take issue both with the
19 representation about how the 1292(b) appeal works, as well as
20 the fact that these discovery issues can proceed while the
21 1292 petition makes its way to the 7th Circuit, regardless of
22 whether the 7th Circuit decides to take it or not.

23 MR. WHITMAN: If I can respond to that, your Honor.

24 THE COURT: Sure. She spoke in stunningly complete
25 sentences. Were you reading that? Did you write this out

1 before?

2 MS. HORN: No, I am not reading that.

3 THE COURT: You are just really smart.

4 MS. HORN: I am very passionate about it, Judge.

5 MR. WHITMAN: Two main points I would like to make
6 to that, your Honor. One is that there is a 7th Circuit
7 case, Goshtasby versus University of Illinois -- the first
8 name is G-O-S-H-T-A-S-B-Y -- 123 F.3d. 427. It is a 7th
9 Circuit case in which there was an appeal on sovereign
10 immunity grounds and the district judge declined to postpone
11 discovery and other proceedings while the case was on appeal,
12 but a judge of this Court, the 7th Circuit, issued a stay
13 while the parties filed additional papers. And then
14 ultimately a motions panel on the 7th Circuit decided that
15 the appeal -- "Because the appeal is not frivolous,
16 proceedings in the District Court are stayed until this
17 appeal has been resolved on the merits."

18 So the 7th Circuit has in very nearly identical
19 circumstances stayed proceedings in a District Court while an
20 appeal on sovereign immunity grounds is pending, which is
21 exactly what would happen if the 7th Circuit accepted the
22 United States' certification petition.

23 The other point I would like to respond to is the
24 idea that the plaintiffs are going to run out of time. In
25 fact, according to plaintiffs' own representations in this

1 case, many, many times they have indicated that the Statute
2 of Limitations for their claims on which they are seeking
3 discovery now would be either one year, two years or
4 three years, at the outside most three years. That Statute
5 of Limitations has long since past. It would have been run
6 out in -- at the latest July of 2009. So the only argument
7 now is whether the Statute of Limitations would be tolled.
8 So there is really no prejudice of plaintiffs in waiting for
9 the 7th Circuit to rule on the certification petition.

10 THE COURT: Well, but -- but, actually, let me
11 respond to that too. I mean not in an adversarial way. But
12 even though technically legally you might be correct, the
13 fact is, of course, people move around and witnesses become
14 unavailable, particularly in a context where we are dealing
15 with potential parties and witnesses who were in Baghdad at
16 this very difficult time, many of whom, probably all of whom
17 don't even reside there. So finding them around the world
18 gets to be very difficult. Even if some of them were
19 employees of the United States, they may be former employees,
20 and finding out where they live and getting their addresses
21 and so on gets to be very, very difficult.

22 And I do have a lot of empathy with the plaintiffs'
23 attorney's position as -- with the issue of the United States
24 in the course of this litigation has chosen never to say what
25 you think actually happened. If -- and I go back to my basic

1 point, if somebody made a mistake and these guys were
2 detained for a period that was too long or they were somehow
3 mistreated while they were detained, I would say make it
4 right. But that has not been the posture.

5 And you -- you know, I am not being critical
6 legally. I mean you have been -- the attorneys for the
7 United States have been very smart, although, as you know, I
8 think with the attorneys that are on the plaintiffs' side
9 here, you have run up against some really smart people too,
10 who now we know -- now after all these years she tells me she
11 is passionate about it besides. So --

12 MR. WHITMAN: I am passionate too, your Honor.

13 THE COURT: I know.

14 So my feeling is -- Judge Keys and I actually
15 discussed these issues. My feeling is that in -- in --
16 rather than decide this in theory, I am not going to stay it.
17 But if there is particular discovery that he thinks ought to
18 go forward that you don't, you can ask him not to. If -- if
19 he authorizes it and you think it is inappropriate for some
20 reason, then, obviously, it can be appealed here. If you
21 want to facilitate that by calling me or coming to my
22 chambers any time that I am here as soon as he rules rather
23 than spend weeks filing motions to appeal, that would be
24 fine.

25 I have -- I don't think I have done anything in

1 this case to try to add procedural burden to either party.
2 So we have had lots of phone conferences and ironically we
3 finally had one where the Chicago attorney --

4 MS. HORN: I apologize for that, your Honor.

5 THE COURT: Don't apologize. Life has priorities
6 and you are attending to something more important. So that
7 is my position. Once again, my judgment may be fallible on
8 it. I had a long talk with Judge Keys about it. He is of
9 the same mind I am. But maybe he will determine that
10 whatever issues they want on discovery are so close to the
11 issues on appeal that it shouldn't go forward, maybe he
12 won't. Maybe he will decide there is some things that you
13 should at least schedule at this point in time.

14 But I do think that plaintiffs' argument that this
15 is a -- now, obviously, I sat on the -- Mr. Rumsfeld's motion
16 for a long time, all right, for a variety of reasons. And so
17 I take some of the blame for that. But I -- I am concerned
18 that the case is getting so old, if it turns out to be a
19 valid case, we will have imposed a terrific burden on the
20 plaintiff just through the passage of time. So at this point
21 in time I am not willing to generally stay it. Under -- but
22 I understand that I could be wrong. And if you want to ask
23 the 7th Circuit to do that while you are up there, that is
24 fine. I -- I will on the record ask them to accept
25 this certification because I think it would be helpful, if

1 there is -- if the case goes forward and there is discovery,
2 to know what information would be relevant to determining
3 what a war zone or field of battle is.

4 MR. WHITMAN: And we certainly appreciate that,
5 your Honor. And just for the record -- and this is more just
6 as a heads-up to opposing counsel, I suspect we will file a
7 request for a stay with the 7th Circuit.

8 THE COURT: That is fine. You know, obviously it
9 is your right. But I don't -- it doesn't affect my feelings
10 about anybody involved.

11 MR. WHITMAN: Right.

12 THE COURT: Well, thank you for being here. Now
13 are you going to go see Judge Keys while you are here?

14 MR. WHITMAN: No, we don't have anything scheduled
15 before him today.

16 THE COURT: What -- as long as you here, do you
17 want to do that?

18 MR. WHITMAN: I don't know if opposing counsel
19 is --

20 MS. HORN: I don't think we have -- what we have
21 pending in front of him right now is an order to -- a couple
22 of discovery issues, but they are briefed. And I know one of
23 them he said he was going to rule by mail.

24 THE COURT: Who --

25 MS. HORN: And the other is just an order that we

1 asked him to enter.

2 THE COURT: Who else in your office is working on
3 the case?

4 MS. HORN: Mike and John and Russell, all of whom
5 are getting ready -- one of whom is in trial and the others
6 who are getting ready for trial.

7 THE COURT: Okay. As long as I am a judge, if --
8 if the United States decides it wants to try to settle the
9 case and I can be helpful, I -- I welcome that.

10 MR. WHITMAN: That is appreciated, your Honor.

11 THE COURT: So, hey, after I am a judge if people
12 want to have me mediate, this is one I would mediate for
13 free.

14 Thanks.

15 MR. WHITMAN: Thank you very much, your Honor.

16 THE COURT: Thank you for coming here.

17 MR. WHITMAN: Sure.

18 MS. HORN: Thank you, Judge.

19 THE COURT: You are welcome. Good luck. Say hi to
20 everybody.

21 MS. HORN: I will. Thank you.

22 (Which were all the proceedings heard.)
23
24
25

CERTIFICATE

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

s/Rosemary Scarpelli/

Date: June 4, 2010